

CIVIL ASSET FORFEITURE IN THE FIGHT AGAINST DRUGS  
(POLICY ANALYSIS)

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Even if the main criminals of an organization are incarcerated, they will be replaced by others who would continue illegal activities, unless their financial assets are removed. Thus, civil forfeiture intends to dismantle the economic infrastructure of drug trafficking networks.

Civil forfeiture considers the property as guilty, rather than the owner, and it may exist even if there is not a criminal action. Therefore, it is claimed that police agencies have chosen easy targets, such as wealthy drug users rather than major drug traffickers. Consequently, it has been particularly challenged on the basis of the Excessive Fines, Double Jeopardy, and Due Process Clauses.

The use of criminal forfeiture instead of civil forfeiture and the elimination of the equitable sharing provision are considered to be the primary solutions.

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## CHAPTER I

### INTRODUCTION

Hume (1751) in his essay asserts that public utility is the sole justification for justice. The rules and regulations that are the practical embodiment of justice are only valuable if they are conducive to the public good. In other words, justice would not be considered a virtue unless it were shown to contribute to the public good. Hobbes (1651), however, maintains that justice functions to ensure the safety and security of society. Locke (1690) speaks on the topic as well, stating that the principal role of justice is to protect private property. Private property is to be considered a natural right, and should consequently be protected (Hobbes, 1651; Locke, 1690; Hume, 1751).

Punishment, on the other hand, is an inevitable aspect of justice. There are lawbreakers in every society, regardless of the laws and the characteristics of that society. Punishment must exist to enforce the law. The question here, however, is what the purpose of the punishment will be. Will punishment be exacted for revenge,

retribution, deterrence or rehabilitation? According to Nozick (1974), revenge is a personal attitude, and is a response to an action that is not necessarily wrong. Retribution, however, is not personal and it is always for wrongdoing (Nozick, 1974).

Bentham (1789) argues that punishment must be performed in order to preserve the public good. Even innocent people could be punished for the sake of the public good. Kant, on the other hand, asserts that punishment exists because people commit crimes. Crime must be punished to balance the scales, an equality principle. Moreover, Beccaria notes the importance of proportionality, stating that punishment should not exceed the harm caused by the crime (Bentham, 1789; Akers, 2000).

The goal of punishment is important because it is considered to be indicative of the principles that are central to a given society. Retribution, rehabilitation, incapacitation, and deterrence are the four principle objectives of punishment in the United States criminal justice system (Cole and Smith, 2001).

Retribution is a justification for punishment that argues the guilty must be punished because criminal actions simply 'deserve' to be punished. Retribution provides for

proportionality between the punishment and the crime (Inciardi, 1999).

Rehabilitation is a strategy of punishment that seeks to prevent future crimes by curing the "illness" of offenders. The state attempts to reintroduce the offenders into society by changing their behaviors through rehabilitation. This is a different approach than the other types of sentencing philosophies. The rehabilitation approach embodies a more optimistic attitude toward the behavior of the offender. However, some argue that rehabilitation cannot serve its goals because it is not available in many institutions. Also, it is said that rehabilitation has not been proven to contribute to crime reduction (Inciardi, 1999).

Incapacitation is a strategy of punishment that advocates the removal of criminals from the community in order to ensure the security of the community. Dangerous offenders are removed from society through institutionalization, imprisonment, or execution (Inciardi, 1999).

Deterrence can either be specific or general. Specific deterrence consists of punishing an individual so that he will not commit a crime again. General deterrence, on the



other hand, punishes the individual to serve as an example to society, thereby discouraging others from committing the same crime. As a result of high recidivism and crime rates, it is said that deterrence is not a viable crime prevention theory (Inciardi, 1999; Akers, 2000).

Many theorists and practitioners consider deterrence to be the main purpose of punishment. As a result, they claim that when a criminal is punished by the state, his punishment discourages him from committing future crimes. At the same time, the public at large will be deterred because they see the example of this man who is punished, an example they do not want to follow (Akers, 2000).

Police, prosecutors, and judges are the primary actors in the criminal justice system. The police are the initiators; every individual who enters the criminal justice comes into contact first with the police, thus any decisions made by the police affect every part of the system (Inciardi, 1999; Cole and Smith, 2001). One of the unique aspects of the criminal justice system is the fact that almost all law enforcement personnel must use some degree of discretion when carrying out their duties (Kappeler, Blumberg, and Potter, 2000; Cole and Smith, 2001).

Kappeler, Blumberg, and Potter (2000) claim that despite the fact that the law applies to everyone equally, it can be applied only to visible crimes and its application is sometimes biased. In fact, police use discretion at the very beginning when deciding whether to make an arrest. Prosecutors use discretion in deciding what charges to pursue. Even judges, perhaps especially judges, use their discretionary powers when making decisions (Kappeler, et al. 2000; Whitebread and Slobogin, 2000). The use of discretion, particularly at the early stages of the criminal justice system, is very important because some laws enable law enforcers to take advantage of the public and abuse human rights. This is especially true when the effectiveness of a criminal justice agency is measured by the profits that they will gain from asset seizures (Bertram, Blachman, and Andreas, 1996).

#### Asset Forfeiture As Drug Policy

In fact, because of the practice of asset forfeiture, the efficiency of drug enforcers is measured by the amount of money they seize rather than the degree to which they are able to eradicate drugs or interfere with drug trafficking. Both of these tasks are the stated goals of the United States drug policy (Lynch, 2000). The focus of

current impact analyses, then, is misplaced on the income generated by the law enforcers, rather than effectiveness of the drug policy (Kappeler, et al. 2000).

Although there are two types of asset forfeiture, criminal and civil, civil asset forfeiture is the focus of this study. This is primarily due to the fact that there is a considerable amount of governmental focus on civil asset forfeiture. This focus has drawn much criticism from those who believe the government should place more emphasis on criminal asset forfeiture.

In fact, when the Crime Control Act of 1984 opened the floodgates to civil asset forfeiture, effectively enabling police agencies to keep the proceeds from forfeiture, civil asset forfeiture became one of the main tools of law enforcement agencies (Cassidy, 1993; Burnham, 1996). Since then, forfeiture has taken its place alongside federal funds, donations, and police taxes as an essential part of the police funds-generating process (Swanson, Taylor, and Territo, 2001).

Thus, police agencies consider civil asset forfeiture to be a useful tool that provides an easy and lucrative income (Cassidy, 1993). Sometimes, agencies will even create a forfeiture account, in which money obtained

through forfeiture in drug-related cases is used, in turn, to buy narcotics in sting operations (Hart, 2001).

Many scholars regard the United States drug policy as an unsuccessful failure. This perception of failure has resulted in a search for ways to overcome the problems associated with it. Everything from increased use of the death penalty to drug legalization has been considered as an alternative for dealing with the drug problem. Asset forfeiture as another alternative was exercised for the first time by the government against drug traffickers under the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Miller and Selva, 1994; Benson and Rasmussen, 1996; Holden-Rhodes, 1997; Jordan, 1999). Asset forfeiture was adopted to act as a deterrence mechanism in the fight against drugs (*Austin v. United States* 1993).

The Asset Forfeiture Fund was considered to have a significant effect on illicit drug traffickers by restricting their financial income, thereby decreasing their illegal activity. However, criticisms were raised that this practice resulted in the abandonment of traditional retribution and deterrence policies, replacing them with a profit-seeking agenda (Miller and Selva, 1994; Ross, 2000). Therefore, it is argued that not only did

forfeiture laws harm the American justice system by encouraging highly criticized implementations of the laws, they also changed the attitude of the police agencies towards the drug war by creating financial motivation among them. Hence, the main goal of this study is to examine the practice of drug-related civil asset forfeiture, both past and present, in the United States.

#### Research Purpose, Objectives, and Questions

The purpose of this study is to examine drug-related civil asset forfeiture in the United States. Among police and scholars there is some debate about the utility of civil asset forfeiture. Law enforcement agencies consider civil asset forfeiture to be an important tool that they can use to supplement their budget. Others, however, argue that civil asset forfeiture is used arbitrarily to the disadvantage of innocent citizens. Thus, despite the fact that it is a frequently used tool of law enforcement agencies, civil asset forfeiture has received much criticism from a wide range of scholars as well as ordinary, innocent people who became victims of the practice.

Therefore, it is the intention of this paper to answer the following three questions:

- 1- What role does civil asset forfeiture play in the war on drugs?
- 2- What are the major Supreme Court cases on drug-related civil asset forfeiture?
- 3- What are the consequences of drug-related civil asset forfeiture?

#### Definition of Terms

There is no real consensus on the definition of the word "drug" in the literature. The definition of a drug may sometimes be attributed to whether the substance is legal or illegal. However, drugs are sometimes classified by whether they are addictive, and by whether they cause psychological or physiological dependence, or both. Problems arise when trying to define the word "drug" mainly because the definition can be manipulated to serve the needs of the people who use it. That is, a substance can be legal or illegal in different time periods. Legality may also depend on the type of people who use a particular drug. For example, morphine is a vital medication that physicians frequently prescribe to patients to deaden severe pain. However, it is illegal to use the same drug

for other, non-medical purposes (Istralowitz and Telias 1998). For the purpose of this study, the word "drug" will be used to refer to a controlled substance. This definition is outlined in the Controlled Substance Act, Section 102 (DEA, 2001).

The origins of civil forfeiture are related to the principle of "deodand," a word derived from the Latin "deodandum" meaning "given to God." Deodand meant that an object was subject to forfeiture to God, and was therefore to be given to Gods chosen ruler on earth, the King. Forfeiture was in reality a valuable resource for the king. This practice among the English laid the foundation for civil forfeiture practices in the United States today (Levy, 1996; Noya, 1996).

In Black's law dictionary, forfeiture is defined as the "deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition." Forfeiture is the governmental seizure of property and other material goods that have been earned by way of criminal activity, or that have been used as part of an illegal action. Civil asset forfeiture is defined as the taking away of property by the government as a punishment for an illegal action (Cole and Smith, 2001). The Supreme

Court in Calero-Toledo v. Pearson Yacht Leasing Co. (1974), defined forfeiture as the governmental seizure of property that was illegally used or acquired without compensating the owner (Calero-Toledo v. Pearson Yacht Leasing Co. 1974).

A review of current literature on the topic indicates that civil asset forfeiture is regarded as an important tool that law enforcement agencies can use against drug dealers and traffickers. However, it is highly criticized for being used arbitrarily by the government as a weapon against innocent people.

#### Methodology

For the purposes of this research, information will be gathered from articles and books about the United States drug policy that cover asset forfeiture implementations, particularly civil forfeiture. Thus, during the course of this research, sources from the field of criminal justice will be used.

In addition, law reviews, and Supreme Court cases will be taken into consideration. Attention will be paid to the footnotes of major books and articles in this field as well.



Also, qualitative data on the drug policy and the application of civil asset forfeiture will be drawn from books, government documents, articles, and law reviews that have been published within the last ten years. This study will examine the implementation of civil asset forfeiture in federal, state and local level law enforcement agencies in the United States. In this study, particular attention will be paid to landmark Supreme Court cases as well.

Despite the fact that there are two types of forfeiture, criminal and civil, the main identifier used to search for documents will be civil asset forfeiture, especially regarding the fight against illicit drugs. This is mainly due to the considerable amount of attention that has been given to civil asset forfeiture both by governmental agencies who implement it and by critics who oppose it.

Research used in this study will be gathered primarily using library catalogs and electronic resources, such as JSTOR, EBSCO, and the Academic Universe within the University of North Texas library's database. Legal search engines, Lexis-Nexis, law reviews, scholarly legal magazines and leading Supreme Court cases within the

Academic Universe will be searched for information related to drug-related civil asset forfeiture.

Moreover, although a considerable amount of the research is library-based, dependable resources from the World Wide Web on the Internet will also be of benefit in this research. Internet search engines, such as Alta Vista, Yahoo, and Google will be searched for keywords, including civil forfeiture, asset forfeiture, and civil asset forfeiture. Documents discovered through these search engines will be reviewed and non-academic sources will be eliminated. Screening criteria will be based on the author, in terms of his or her scholarly nature, and the source.

To provide a framework for the above-mentioned information, the following variables will be considered:

- i. Asset forfeiture,
- ii. Drug policy,
- iii. Equitable sharing,
- iv. Probable cause,
- v. Effectiveness measurement.

Hence, the primary keywords used will be "drug policy," "narcotics," "war on drugs," "civil asset forfeiture," "forfeiture," "asset forfeiture and drugs," "forfeiture and drugs," "asset forfeiture fund,"

"effectiveness measurement," and "civil asset forfeiture reform act." Information related to criminal forfeiture will be cited only when it adds to the discussion of civil asset forfeiture. Also, the use of asset forfeiture in cases concerning crimes other than drugs, such as gambling, money laundering or fraud, will not be taken into account.

Some essential sources of data on drug-related civil asset forfeiture are as follows:

- i. **Governmental Sources.** In the United States there are several formal organizations that are used to enforce the United States drug policy. The Drug Enforcement Administration (DEA) is the main organization among them. The Office of National Drug Control Policy (ONDCP) and its annually published Drug Control Strategy Reports play an important role in drug policy. The Asset Forfeiture Series published by the United States Bureau of Justice Assistance and other publications of the DEA, ONDCP, and National Institute of Justice will be used in this study.
- ii. **Non-Governmental Sources.** There are various organizations that play an important role by conducting research, collecting data and making assessments on drug-related asset forfeiture practices

in the United States. Thus, information from non-governmental organizations such as Forfeiture Endangers American Rights (FEAR), and Drug Sense and its Media Awareness Project, will be utilized in this study in addition to other sources.

In conclusion, this research will mainly be based on library and Internet sources, and will be qualitative in nature.

#### Limitations

There are enormous amounts of data available regarding asset forfeiture. However, the focus of this study is limited to the use of civil forfeiture in the fight against drugs. There are forfeiture laws concerning crimes other than drugs, such as gambling, money laundering and fraud. However, this study will be based solely on the analysis of civil asset forfeiture as it relates to the drugs that are defined as illegal by the Controlled Substance Act.

Although the drug policy utilizes a wide range of professionals, including police officers as well as many other governmental professionals, asset forfeiture practices are exercised predominantly by police agencies and sheriff's departments at the local level. Because these two types of organizations are the ones that practice

civil asset forfeiture the most, this study will be limited to the civil asset forfeiture practices of these police agencies and sheriff's departments.

Finally, this study is restricted to sources published within the last ten years. This is primarily because civil asset forfeiture has been utilized for a long time and there is a massive amount of data on it. Also, a majority of the sources published within the last ten years include data on any previously adopted significant regulations.

This study will consist of four chapters. The second chapter discusses the historical background of civil asset forfeiture and its role in the fight against drugs. The chapter points out that civil asset forfeiture in the fight against drugs have received a lot of criticism from a wide range of scholars. The majority of these scholars argue that civil forfeiture is an important financial source for the police rather than a useful weapon in the fight against drugs.

The third chapter will focus on the legal aspects of civil asset forfeiture. The primary legal considerations of civil forfeiture proceedings, such as the innocent owner defense, excessive fines clause, and double jeopardy

clause, are discussed in light of various landmark Supreme Court cases.

The fourth chapter of this study will be consisting of an in-depth analysis of civil asset forfeiture practices and their consequences in the United States. The equitable sharing provision and the misperception of civil asset forfeiture by law enforcement have arguably resulted in negative consequences. These consequences are shown in various studies conducted by several researchers. Chapter Four will also discuss solutions to the problems inherent in civil asset forfeiture. The use of criminal forfeiture instead of civil forfeiture and the elimination of the equitable sharing provision are considered to be the primary solutions.

## CHAPTER II

### THE ROLE OF CIVIL ASSET FORFEITURE IN THE AMERICAN DRUG POLICY

#### A Brief Look at the War on Drugs

At its heart, the official drug policy of the United States attempts to accomplish two main goals. First, the United States drug control strategy aims to reduce the supply of drugs that are available on the American drug market. Secondly, the United States drug policy seeks to reduce the demand for drugs by reducing the number of drug users (ONDCP, 2000). In order to achieve these goals, the United States seeks to unite the efforts of various governmental and nongovernmental institutions, including law enforcement agencies, religious groups, community groups, health care professionals and educators (Schaler, 1998).

There are several governmental organizations involved in the war against drugs; these include the Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), Immigration and Naturalization Service (INS), Bureau of Alcohol, Tobacco and Firearms (ATF), and

Customs Service (Abadinsky, 2001). There are also various multi-jurisdictional task forces, such as the Organized Crime Drug Enforcement Task Forces (OCDETF), and forty-one formal and twelve provisional local and state task forces funded by the DEA, that operate all over the United States (Lyman and Potter, 1998).

The first "War on Drugs" was declared by Richard Nixon in 1969. Operation Intercept called for the stationing of numerous troops at the Mexican border in order to search 100,000 vehicles. Operation Intercept lasted only three weeks, costing much more than it gained. In the 1980s, the Reagan Administration adopted a zero tolerance approach towards drugs. This approach yielded poor results (Jenkins, 2001).

The current war on drugs was initiated by President George H.W. Bush in 1990. This war aimed to end the activities of all known drug dealers. This plan, therefore, focused mainly on ending the supply of illicit drugs. For instance, a mobile task force was sent to the Caribbean to interdict a drug shipment. Napalm and defoliant were sprayed over the Colombian hills for this purpose (Jenkins, 2001).



Bill Clinton, taking office after Bush, neither withdrew this fleet nor canceled its \$2 billion annual funding allotment, due to the fear that this cancellation would be seen as admitting defeat. All in all, the Bush and Clinton programs aimed at the symptoms but not the cause. Efforts to reduce the demand for drugs were neglected; instead, supply was targeted. Enforcement simply held more appeal for the public. Politicians would rather have their pictures taken with their boots on a drug dealer's neck than helping an addict during detoxification (Jenkins, 2001).

The efforts to reduce the number of drug users are considered to be a failure by many due to the fact that the limited benefits of prevention and treatment programs are outweighed by cruel, punitive policies against drug use. The zero-tolerance policy that was adopted in the late 1980s to promote abstinence among drug users called for harsh punishments against those who were in possession of even very small quantities of drugs. The vehicles that drug users drove were often seized under forfeiture laws based on the fact that these vehicles were likely to be used to transport the user to the point of the drug sale (Bertram et al. 1996).

In fact, Miller (1996) claims that the war against drug users is a deliberate process of a destruction planned by the government. He argues that the government targets drug users, who are actually "a group of regular people" for destruction, through the process of identification, ostracism, confiscation, concentration, and annihilation. Each element constitutes a link in the chain of destruction. This process, Miller claims, is comparable to the destruction process that was perpetrated by Nazi Germany against the Jewish people. He alleges that drug users are targets that the United States government deliberately intends to eliminate (Miller, 1996).

On the other hand, critics argue that public policy regarding the fight against illicit drugs is based on the selfishness of bureaucrats and concerns about the community budget. Bureaucrats who "advertise" their participation in the drug control strategy are often able to gain the public support needed to win elections and thus formulate their own drug policies. These bureaucrats gain funding for their programs, sometimes at the expense of public education or welfare programs. They have to compete for their share of local, state and federal funds; they also compete with

other law enforcement bureaucracies for funding (Benson and Rasmussen, 1996).

Thus, it is important for them to show taxpayers and other interested parties that law enforcement successfully does its job. Because the amount of crime that is prevented cannot be measured, other more measurable factors must be used to ascertain the effectiveness of law enforcement efforts. The number of arrests, cost of seized drugs, and asset seizure totals all play an important role in this regard (Benson and Rasmussen, 1996).

Despite the efforts of the war on drugs to increase drug prices on the black market and thereby decrease the number of drug users, there have been few fluctuations in the prices of illicit drugs, and drug users have remained unquenchable. The drug abuse problem still continues and the war on drugs is already considered to have failed by many observers (Miller and Selva, 1994; Holden-Rhodes, 1997; Istralowitz and Telias, 1998; Jordan, 1999). The American people are not informed about the facts regarding the war on drugs, although most of them have in one way or another, become victims of drugs (Holden-Rhodes, 1997).

The war on drugs is considered to have failed despite the use of harsher sentences, such as mandatory minimums

and asset forfeiture laws. Drug traffickers have avoided forfeiture by using other individuals' assets, through money laundering or the use of rental facilities. Mandatory minimums have resulted in an increased number of Americans behind bars, creating significant prison overcrowding problems for most of the states (Benson and Rasmussen, 1996; Currie, 1998).

#### Role of Civil Asset Forfeiture in the Fight Against Drugs

The origins of forfeiture are related to "deodand," a word derived from the Latin, "deo dandum" meaning "given to God." Deodand meant that any object that was the subject of forfeiture to God, was in fact subject to the English crown. Forfeiture was a valuable source of income for the king. It was subsequently passed along to the United States, serving as basis for its civil forfeiture practices. Objects rather than individuals were sued by the government sometimes under funny names, such as the *United States v. One 1963 Cadillac Coupe de Ville Two Door*, in which an automobile was sued. The proceeding was regarded as a civil proceeding, and was viewed as a remedial action rather than a punishment (*Calero-Toledo v. Pearson Yacht Leasing Co.* 1974; Levy, 1996).

Thus, the history of asset forfeiture goes back to the ancient English common law of the 1700s, in which vessels were seized due to their owners' failure to pay customs taxes. And, as mentioned above, colonial America was introduced to asset forfeiture because of the fact that the British Crown was the principal beneficiary of colonial America at that time. The American legal system was subsequently based on English common law (Reed, 1992; Burnham, 1996; Eldredge, 1998).

In the beginning, civil forfeiture was not related to drug crimes. The only condition for a property's forfeiture was that it was either illegal, an illegal contraband, or it was used while committing a crime. For example, pirate ships that were used to smuggle contraband would be forfeited. Civil forfeiture was later utilized in the Civil War, and it was regarded as an important weapon against the Confederacy. People who supported the Confederacy were deprived of all of their property (Miller, 1996), and consequently the United States government was provided with a considerable amount of income (Noya, 1996).

The civil forfeiture of any kind of proceeds that originated from drug trafficking was authorized by Congress in 1978. This authorization gave prosecutors an effective

civil instrument that would enable them to seize the proceeds of drug trafficking (Goldsmith, 1992; Schmallegger, 2001).

In spite of the existence of hundreds of laws regarding civil asset forfeiture, the Racketeer-Influenced and Corrupt Organizations Act (RICO) and the Continuing Criminal Enterprise (CCE) Statute made the practice of forfeiture the most fundamental aspect of the war on drugs. RICO was introduced as an important safeguard in the fight against organized crime, while CCE was also known as the "kingpin" law as a result of the fact that it was intended to target major drug traffickers (Miller, 1996).

However, asset forfeiture was not common before the Drug Enforcement Administration (DEA) created a Model Forfeiture of Drug Profits Act, and encouraged state law enforcers to utilize asset forfeiture practices through its "Drug Agents' Guide to Forfeiture of Assets" handbook in 1982. Moreover, the Anti-Drug Abuse Bill of 1988 provided much harsher penalties for the violation of drug laws. It also gave many more resources to law enforcement agencies, and established the Asset Forfeiture Fund (Miller and Selva, 1994; Noya, 1996).

The practice of federal forfeiture today is considered to be one of the most efficient legal instruments in the fight against illicit drugs by the law enforcement agencies. This practice is the primary weapon used to interfere with drug related activity. It is more efficient than the Racketeer-Influenced and Corrupt Organizations Act (RICO) and The Continuing Criminal Enterprise (CCE) Statute (Lyman & Potter, 1998).

There are two types of asset forfeiture that are permitted by federal narcotics laws: criminal asset forfeiture and civil asset forfeiture. In the case of civil asset forfeiture, the property that is sought after is the direct target of the proceedings. This is due to historical precedents that consider the property itself to be guilty of illegal behavior (Goldsmith and Lenck, 1992).

Criminal forfeiture was introduced with the enactment of the Racketeer Influenced and Corrupt Organizations Act (RICO). Criminal asset forfeiture is different than civil forfeiture because it targets the individual criminals, not the assets (Reed, 1992). Also, criminal forfeiture requires the conviction of a crime, and the government has to follow due process assurances in criminal trials. In civil forfeiture cases, however, probable cause is enough, and

the government does not have to prove a crime. Rather, it is the property owner's responsibility to refute the accusation (Miller 1996; Warchol, Payne, and Johnson, 1999; Larson, 2000). Criminal forfeiture is considered to have yielded ineffective results, mostly because law enforcement agencies were not allowed to seize the assets during trial proceedings (Barnet, 2001; Levy, 1996).

Thus, the term forfeiture has come primarily to mean civil forfeiture by the Drug Enforcement Administration, in cases where there is not a statute necessitating a criminal prosecution. In addition, the swift, less costly and more productive characteristics of civil forfeiture "in rem" actions make it more popular than criminal forfeiture (Levy, 1996). The federal government tends to follow the money. It targets the financial foundation of illegal drug trafficking networks, and their subsequent money laundering activities, using asset forfeiture to seize the fruits of illegal ventures (ONDCP, 2000).

There are, for the most part, three types of materials that can be forfeited: contraband, proceeds, property or instrumentalities. The term contraband refers to items that are illegally obtained. Proceeds are materials that are earned through illegal actions. The term proceeds is open



to discussion, but can be defined as "that which is received in exchange when an object is sold, traded, or disposed of otherwise" (Fann, Gordon, and Leach, 1993:5). For example, any property that is bought with money obtained from illicit drug trafficking becomes the proceeds of the exchange. "Property" refers specifically to property that is used in the course of an illegal act. In fact, property can be subject to forfeiture if there is simply an intention to use it in a prohibited act (Fann et al. 1993; Watterson, 1997).

Although there are not many criticisms about the seizures of contraband or proceeds, the forfeiture of instrumentalities has been somewhat controversial in forfeiture history. This is mainly because of the personification that considers the property itself guilty of wrongdoing. This enables the government to take legal action against the property with no notice. What is more, it is the owner's responsibility to prove that the property is not guilty. Furthermore, the forfeiture of instrumentalities has been the subject of criticism because it altered the attitude of law enforcement agencies towards crime prevention. It has been argued that law enforcement targets the assets rather than the criminals. Finally,

criticisms were raised over the degree of disproportionality between the offenses and the assets confiscated (Watterson, 1997). These concepts will be discussed further in Chapter Four.

Forfeiture laws permit three different types of civil forfeiture and asset seizure. Summary forfeiture, administrative forfeiture, which can also be considered under the heading of non-judicial civil forfeiture, and civil-judicial forfeiture (Warchol et al. 1999).

Summary forfeiture applies to illegal properties that are described as contraband. Administrative forfeiture allows for the seizure of properties that cannot be imported, financial mechanisms, means that are used for shipping, storing, or importing illegal materials, and all of the assets with a value of at least \$500,000.

Administrative forfeiture is considered to be a competent, rapid, and cost-effective approach (Warchol et al. 1999).

Civil-judicial forfeiture provides the noteworthy consequence of putting the burden of proof on the defendant rather than the government. This strategy initially developed when drug traffickers were considered to be foreign nationals who live outside America. In their case, the requirement of a conviction to initiate forfeiture

would be inappropriate because they could keep themselves out of the United States borders. Hence, civil forfeiture that does not require a criminal charge in order to initiate asset forfeiture has become a significant and rather controversial policy (Warchol et al. 1999).

In addition, one of the foremost advantages of civil forfeiture is that law enforcement officials do not need more than probable cause to initiate the forfeiture process. Moreover, it is the claimant's responsibility to fight to recover the forfeiture (Goldsmith, 1992; Friedman, 1999). Circumstantial evidence is enough to start the forfeiture process in narcotics trafficking cases, where it would be unusual to gather direct evidence (Goldsmith, 1992; Noya, 1996).

Some common elements of circumstantial evidence include close proximity, spending extensive hard cash, cash hordes, and attempts to conceal the factual possession of assets. Close proximity refers to the location of the assets and closeness of drugs seized, and is considered to be an important indication of drug trafficking (Goldsmith, 1992).

In other words, this type of forfeiture considers the proximity between assets and drugs. Spending extensive hard

cash and the failure to give a reasonable explanation for income are also types of circumstantial evidence that are indicative of drug trafficking. Evidence that consists of various combinations of these factors, depending on the details of the case, further ensures that targeted assets represent narcotics profits (Goldsmith, 1992).

### Conclusion

The underlying principle in civil asset forfeiture is that the property itself is regarded as guilty, rather than the owner. In other words, property that is subject to forfeiture can be considered "guilty" itself depending on its direct involvement in a crime, or even its use in the course of committing a crime. Civil forfeiture may exist even if there is not a criminal action. Particularly, the forfeiture of the real property of criminals may well result in the removal of their assets, and the deterrence of similar criminal actions, all the while establishing a lucrative source of income for law enforcement agencies (Aylesworth, 1991).

Supporters of civil forfeiture laws assert that criminal organizations continue to undertake their illegal activities even if their key members or leaders are convicted or put in prison except in cases where their

economic base is targeted. The act of seizing the assets derived from criminal enterprise is intended to dismantle the economic infrastructure of various drug trafficking and otherwise criminal networks (DEA, 2001; Janzen, 1990; Reed, 1992). This is primarily because even if the principal, command level people in an illicit drug trafficking organization are incarcerated, there will be other people who will replace them and continue their illegal activities unless the financial assets are removed from the organization (Aylesworth, 1991).

A business without a financial base will most likely fail. For this reason, the federal government targets the financial foundation of illegal drug trafficking networks and money laundering rings through the use of asset forfeiture (ONDCP, 2000). Forfeiture laws are considered to be among the most powerful tools available to deprive drug trafficking organizations of the resources they need to continue their illegal activities (DEA, 2001; Warchol et al. 1999). Also, they have an important role in decreasing recidivism and reducing crime (Hartman, 2001).

On the other hand, there are criticisms over the practice of civil forfeiture. The United States Constitution provides protection against unfair searches

and seizures within the Fourth Amendment. Depending on the circumstances, the police are required to have either probable cause or a warrant in order to initiate a search to gather evidence that may pertain to a crime that they believe has been committed (Swanson, et al. 2001; Weinreb, 2001). In practice however, forfeiture laws have been criticized for violating the constitutional rights of the people because police can seize a person's property without a warrant, based solely on probable cause. This practice leaves the person whose property has been seized with the responsibility of proving that he or she is innocent in order to recover the property (Bertram, et al. 1996; Eldredge, 1998; Jensen and Gerber, 1996; Friedman, 1999). Furthermore, this person must prove that he or she did not intend to commit a crime due to the fact that asset forfeiture is permitted even in cases where nothing more than an intention to commit crime exists (Aylesworth, 1991; Lynch, 2000).

Therefore, although civil asset forfeiture is regarded as an important tool in the fight against illicit drugs, and even though its primary targets are major drug traffickers and drug kingpins, in practice, police agencies have shown a tendency to choose easy targets, such as

wealthy drug users or people who have more assets (Bauman, 1995).

In conclusion, this chapter points out that the United States drug policy and civil asset forfeiture in the fight against drugs have received a lot of criticism from a wide range of scholars. The majority of these scholars consider the United States drug policy to be an unsuccessful policy. They argue that civil forfeiture is an important financial source for the police rather than a useful weapon in the fight against drugs.

Criticism over civil asset forfeiture is not limited simply to what is mentioned in this chapter. Civil asset forfeiture practices have been challenged based on several legal issues, such as the use of excessive fines, double jeopardy, and failure to follow due process.

### CHAPTER III

#### LEGAL ANALYSIS

One of the foremost advantages of civil forfeiture is that law enforcement officials do not need more than probable cause to initiate the forfeiture process (Goldsmith, 1992; Blacher, 1994; Jensen and Gerber, 1996). Most of the time, probable cause is enough to initiate the forfeiture process without a warrant. Criminal forfeiture requires the conviction of a crime, and the government has to follow due process assurances in criminal trials. In civil forfeiture, however, probable cause is enough, and the government does not have to prove its case. Rather, it is the property owner's responsibility to refute the accusation (Miller, 1996; Jensen and Gerber, 1996; Friedman, 1999).

This is particularly important because of the nature of the illegal drug trade. The illegal drug trade is considered to be difficult to detect because it involves consensual crimes. The people who get involved in drug-related activities, whether as sellers or buyers, are involved voluntarily. Thus, in most cases, there are not



any victims to complain about the illegal acts.

Consequently, law enforcement officers have to depend on probable cause or exercise more intrusive techniques that are likely to violate the due process rights of the individuals (Jensen and Gerber, 1998).

Primary Considerations: The Excessive Fines, Double Jeopardy, and Due Process Clauses

Consequently, there has been much criticism directed towards the practice of civil asset forfeiture. Civil asset forfeiture proceedings have been challenged particularly on the basis of the Excessive Fines, Double Jeopardy, and Due Process Clauses (Johnson, 2000).

The underlying concept behind the excessive fines clause is the principle of gross disproportionality established by the United States Supreme Court in *United States v. Bajakajian* in 1998. The severity of the forfeiture proceeding should be proportional to the offense committed by the owner of the seized property. In order to have a violation of the excessive fines clause, the claimant must establish gross disproportionality by proving that the fine is unusual, grossly excessive, and not proportionate to his or her offense (*United States v. Bajakajian* 1998; Warchol et al. 1999).

The double jeopardy clause assures that a person cannot be prosecuted twice for the same crime. The Fifth Amendment bars multiple prosecutions or punishments for the same crime by the same sovereign (Inciardi, 1999; Whitebread and Slobogin, 2000).

In United States criminal justice history, opinions about the double jeopardy clause have varied depending on which justices of the United States Supreme Court were in charge. Civil forfeiture proceedings were sometimes considered to be remedial rather than punitive, and did not then constitute double jeopardy (Watterson, 1997). Some years later however, civil forfeiture proceedings were regarded as punitive, consequently they did constitute double jeopardy in a later United States Supreme Court decision (*United States v. Halper* 1989; Watterson, 1997). In another landmark case, the United States Supreme Court ruled once again that civil forfeiture proceedings were considered to be remedial rather than punitive and do not constitute double jeopardy (*United States v. Ursery* 1996; Watterson, 1997). This, the most recent ruling of the Court on this matter, still holds true today.

The Due Process model of the criminal justice system focuses on the elimination of error and the possibility of error in the criminal justice system. Of primary consideration are the potential consequences if there were a mistake. This model relies on the courts as the primary mechanism to identify errors. Legal guilt is as important as factual guilt. The system asserts that the legal process must thoroughly be followed (Whitebread and Slobogin, 2000).

#### Doctrines of Civil Asset Forfeiture

There are also various doctrines that pertain to civil forfeiture. These include the taint doctrine, the personification fiction, the innocent-owner defense, and the relation-back doctrine (Reed, 1992).

The taint doctrine states that the illegal use of an object "taints" it and therefore makes it subject to forfeiture (Reed, 1992). The taint-doctrine is also one of the controversial aspects of asset forfeiture in terms of its arbitrary use by police agencies. Police can seize cash money claiming that their dogs sniff out cash money as drug-tainted (Schneider and Flaherty, 1991). The lesser requirement of probable cause has resulted in numerous claims of due process violations by law enforcement

agencies. For example, with a simple probable cause requirement, the police have the authority to arrest the owner of a food store and seize his earnings just because they find a couple of dollar bills with a cocaine scent on them (Vallance, 1993).

A study was made on cocaine-tainted money in Dallas, Austin, Miami, New York City, Milwaukee, Los Angeles, Pittsburgh, Syracuse, Memphis, and Seattle. The study that lasted seven years showed that almost all of the bills with an average of ninety-six percent, tested positive for cocaine. Thus, it is easy for bills to become tainted with cocaine and for the dogs to point out those bills, even if the person who currently possesses them has nothing to do with drugs (Schneider and Flaherty, 1991). In addition, cocaine-tainted bills cannot be considered to be evidence that the current holder had actual direct contact with drugs. Moreover, the bills that are seized by police in drug busts are not always destroyed. They are usually put back into circulation through local banks (Schneider and Flaherty, 1991).

Thus, the use of canine units to detect drug-tainted cash money has been challenged by the fact that more than 90% of all bills are tainted by cocaine. Lab tests run on

money to detect cocaine yield positive results due to the rapid and extensive circulation of cash bills (Levy, 1996).

The relation-back doctrine is associated with the taint doctrine. The relation back doctrine makes it possible for the government to seize property today that was tainted in the past, even if the owner has changed over time. The relation back doctrine is an important tool for drug enforcement officers, one that enables them to confiscate the goods of unknowing property owners. For example, an apartment building can be seized from its current owner, even though drugs were being dealt out of the building more than four years ago under a different owner (Reed, 1992; Levy, 1996; Miller, 1996).

Personification fiction considers the property itself to be legally responsible for the illegal act, regardless of its owner's innocence (Reed, 1992; Barnett, 2001). Thus, the property of people who are not involved in illicit drug trafficking can be seized according to the laws. This is because in a civil forfeiture proceeding, the assumption is made that the property itself is guilty of an unlawful activity (Goldsmith and Lenck, 1992). For example, in the United States Supreme Court's decision in 1974 in *Calero-Toledo v. Pearson Yacht Leasing Company*, a rented yacht was

seized because of a marijuana cigarette, which was found on the yacht (*Calero-Toledo v. Pearson Yacht Leasing Company* 1974).

In *Calero-Toledo v. Pearson Yacht Leasing Company*, the person who rented the yacht out was neither involved in the criminal act that was committed, nor was he even aware of the yacht's illegal use. The case took place in Puerto Rico. The Court held that under Puerto Rican Statutes, he was not deprived of his property rights without just compensation. This was simply because the owner of the vessel voluntarily assigned the renters temporary possession of the vessel (*Calero-Toledo v. Pearson Yacht Leasing Company* 1974).

Furthermore, the owner could not provide any evidence proving that he made reasonable efforts to prevent the illegal use of his property. This decision raised two constitutional concerns: first, that the seizure took place without prior notice, second, that the property of an innocent party was seized without providing fair compensation. The rationale was that the property itself was guilty of wrongdoing (*Calero-Toledo v. Pearson Yacht Leasing Company* 1974).

In another striking example, a Hawaiian couple had a terrible experience with civil asset forfeiture as a result of their mentally ill son's marijuana use. Their son was undergoing therapy and threatened them with suicide if they would not let him use marijuana, so they did. He was subsequently sentenced to probation following his guilty plea for growing marijuana in 1987. However, four years after the incident, the police rediscovered the case in their files and initiated proceedings for possibilities for the forfeiture of the house. The parents knew that marijuana was being grown in their house. They were not regarded as innocent owners and received no sympathy. Consequently, their house was forfeited (Schneider and Flaherty, 1991; Trebach and Inciardi, 1993; Miller, 1996).

The United States Constitution provides protection against unfair searches and seizures under the Fourth Amendment. With a very few specific exceptions, police are required to obtain a judicial order in the form of a warrant in order to initiate a search to gather evidence with respect to a crime that they believe has been committed (Swanson, et al. 2001; Weinreb, 2001). Forfeiture laws threaten to undermine the constitutional rights of citizens. They allow police to seize a person's property

without a warrant, with only a suspicion based on probable cause. This leaves the individual citizen with the responsibility of proving that he or she is innocent in order to recover the property (Bertram et al. 1996; Miller, 1996; Eldredge, 1998; Reed, 1992). This holds true even in cases where no crime has been committed but it is believed that there was the intention to commit a crime (Lynch, 2000; Jensen and Gerber, 1998).

Civil forfeiture is an important tool in the war on drugs, one that takes away the property of drug users. Unfortunately, it also takes away the property of innocent people. Law enforcers take advantage of the lesser probable cause requirement of asset forfeiture cases and leave the burden of proof to the civilians. The owners of seized property are required to prove that not only were they unaware that their property was being illegally used by the drug offender, but also that the offender gained custody of their property by way of an illegal act (Reed, 1992; Miller, 1996). This is called the innocent owner defense. Contrary to the fundamental principles of the American judicial process, the owner is assumed to be guilty and must prove otherwise in order to regain possession of his own property (Reed, 1992).



## Major United States Supreme Court Cases

The United States Supreme Court finally paid attention to the growing claims that civil forfeiture posed problems in regards to the excessive fines, double jeopardy, and due process clauses. The Court made significant rulings regarding these concepts as they relate to civil asset forfeiture practices (Eldredge, 1998).

Double Jeopardy was considered to apply strictly to criminal proceedings before the United States Supreme Court's decision in 1989. Civil proceedings were considered to be "in rem" proceedings, that is, proceedings brought against property that did not impose punishment on any actual person. The United States Supreme Court in *United States v. Halper*, in 1989, however, held that civil forfeiture proceedings should not be considered remedial. Rather, they potentially violate the double jeopardy clause. The *Halper* case involved the submission of a considerable number of fake claims under the Medicare program in order to receive compensation from the government. The respondent was subject to a civil forfeiture action totaling over \$130,000 following his conviction. The Supreme Court focused their attention on the civil asset forfeiture proceedings. Do these

proceedings, as an addition to the criminal proceedings, constitute double jeopardy? Also, the Court was interested in the proportionality of the offense to the punishment imposed upon the defendant (*United States v. Halper* 1989; Watterson, 1997).

The Court decided that the civil versus criminal nature of the proceedings was not their main concern when considering the question of double jeopardy. The amount of the respondent's money that was subject to forfeiture was grossly disproportionate to the loss of the government. Therefore, the Court held that civil proceedings that impose disproportionate sanctions go beyond restitution. They constitute punishment and as such they violate the double jeopardy clause. This was the first time that the United States Supreme Court characterized civil forfeiture as potentially a punishment rather than a remedy, one that could violate the double jeopardy clause (*United States v. Halper* 1989; Watterson, 1997).

Another important decision in favor of the property owners was made by the Supreme Court a couple of years later in 1993. In *United States v. A Parcel of Land*, which is also known as "92 Buena Vista Avenue", a woman's house was subject to forfeiture by the government. The forfeiture

action was based on the fact that there was probable cause to believe that the money used to buy the house was derived from illicit drug trafficking. The owner of the house claimed that she was unaware of the origins of the money; it was given to her as a gift. Thus, she claimed that she should be considered to be an innocent owner. The United States Supreme Court ruled that a property could not be seized by the government based on taint-doctrine if the owner did not know of his or her property's relation with drugs in the past (Heching, 1993; *United States v. A Parcel of Land* 1993; Eldredge, 1998).

After the *United States v. A Parcel of Land* decision, the burden of proof shifted at least partially to the government. It was now the responsibility of the government to prove that the owner knew about the unlawful relationship between his or her property and the illegal act. Only when the government could prove this knowledge could it initiate civil asset forfeiture proceedings based on the taint-doctrine (*United States v. A Parcel of Land* 1993; Reed, 1992).

Civil asset forfeiture proceedings involve disproportionality in terms of crime and punishment (Schneider and Flaherty, 1991; Trebach and Inciardi, 1993;

Miller, 1996). Another landmark case addressed the question of proportionality, using the test established in *Halper* to decide whether civil proceedings could be construed as punitive (Watterson, 1997). In *Austin v. United States* in 1993, the Court held that the Excessive Fines Clause of the Eighth Amendment was applicable both to civil and criminal forfeiture. In *Austin*, the petitioner was arrested for possession of illegal drugs. The government brought a civil forfeiture action against the petitioner's auto shop and mobile home, properties that were considered to be instrumental to the crime. The government claimed that they either were utilized or were intended to be utilized in the illegal drug trade (*Austin v. United States* 1993; Brodey, 1997).

The Court wanted to clarify whether forfeiture imposed a punishment. The Court could then decide whether the forfeiture of the petitioner's auto shop and mobile home should be subject to the Excessive Fines Clause limiting financial punishment. The Court held that, historically and presently, civil forfeiture is regarded as a legal tool that is intended to both deter and punish. Thus, it is subject to the Excessive Fines Clause of the Eighth Amendment (*Austin v. United States* 1993; Watterson, 1997).

Consequently, the Court stressed that the rationale for the decision in *Austin* was that the remedial interest of the government was the seizure of contraband, whereas the mobile home and the auto-body shop in Austin were not contraband. The decision required that the amount of the property or cash should be proportional to the crime, otherwise it would be considered to be an excessive penalty (*Austin v. United States* 1993; Watterson, 1997).

Another important decision was made in *United States v. James Daniel Good Real Property*, also in 1993. In this case, the government seized the individual's property despite the fact that he had completed his sentence for the violation of drug laws four years ago. What is more, the individual was given no prior notice, nor was he subject to a legal action (*United States v. Real Property* 1993; Eldredge, 1998).

In its decision, the Court held that due process required prior notice and an opportunity for a trial should be given to individuals before they are deprived of property. The only exception to this would be in cases with exigent circumstances (*United States v. Real Property* 1993; Eldredge, 1998).

Six months later, the United States Supreme Court made an important ruling in a case that involved the government's attempt to apply taxes to the seized and subsequently destroyed drugs (*Department of Revenue of Montana, Petitioner v. Kurth Ranch* 1994; Watterson, 1997). In *Department of Revenue of Montana v. Kurth Ranch* in 1994, the marijuana farm of the Kurth family was discovered by law enforcement, and the drugs were subsequently destroyed. Following a criminal proceeding, a civil proceeding imposing taxes on the destroyed drugs was initiated by the government as well (Watterson, 1997).

In this case, the Court issued a reminder that civil forfeiture is an extremely important tool for law enforcement. It can be used effectively to deter crime, generate revenue for the government, and levy a financial burden on defendants. However, the government may not impose an additional civil penalty on a defendant in a separate proceeding (*Department of Revenue of Montana, Petitioner v. Kurth Ranch* 1994).

Therefore, the Supreme Court focused on the fact that if the tax imposed by the government served any punitive goals, it would be subject to the limits of the Double Jeopardy Clause. The Court held that the application of the

drug tax following a conviction violated the double jeopardy clause under the Fifth Amendment. The Court stressed that the tax was not imposed on a property as it was intended to be, but it was levied on drugs that had been destroyed and were consequently no longer owned by the individual. Thus, the tax levied by Montana was not regarded as a remedial act. Rather, it was seen as an additional punishment (*Department of Revenue of Montana, Petitioner v. Kurth Ranch* 1994; Watterson, 1997).

In *Bennis v. Michigan* in 1996, however, the innocent owner defense was rejected by the Court. In this case, a jointly-owned automobile was subject to forfeiture because of its use in an illegal action by the husband, even though his spouse was unaware of the illegal act. The Court held that the innocent owner's due process rights were not violated. The Court made the justification on the grounds that the property itself was guilty and the half-owner of the property could be held accountable for the other party's illegal behavior on the ground that she entrusted her property to him. However, this decision was criticized as being unfair. It was argued that the Court should have applied the excessive fines clause analysis that was decided in *Austin v. United States* in 1993. In *Austin*, the

Court had held that forfeiture under the Excessive Fines Clause of the Eighth Amendment was applicable to both civil and criminal forfeiture. The rationale was that the remedial interest of the government was simply the seizure of the contraband, whereas the mobile home and the auto-body shop in Austin were not contraband (*Austin v. United States* 1993; *Bennis v. Michigan* 1996; Baur, 1996; Schroeder, 1996; Brodey, 1997).

In the same year the United States Supreme Court made another striking decision regarding the nature of civil asset forfeiture. In a landmark case, *United States v. Ursery* in 1996, it was held that civil forfeiture proceedings should be considered remedial rather than punitive, and they do not constitute double jeopardy. It was stated that even though forfeiture proceedings have some punitive characteristics, they have primarily remedial, non-punitive objectives (*United States v. Ursery* 1996; Schroeder, 1996; Watterson, 1997).

*Ursery* involved the seizure of marijuana on the respondent's property, the subsequent conviction of the respondent, and the civil asset forfeiture proceedings undertaken against the property. Civil forfeiture proceedings were brought against the property on the



grounds that the house had been involved in the illegal drug business due to its use by the respondent. The lower courts held that civil forfeiture was a punishment, and therefore constituted double jeopardy, based on the decisions made in *Kurth Ranch*, *Austin*, and *Halper* (*United States v. Ursery* 1996).

The Supreme Court, however, did not agree with the decisions of the lower courts, and it reversed the case. The Court had held in *Austin* by referring to *Halper* that civil asset forfeiture would be examined within the scope of double jeopardy as long as it had punitive nature. Despite this fact, the Court refused to broaden the standard established in *Halper* and *Austin* to the civil asset forfeiture proceedings in *Ursery* (Watterson, 1997).

Furthermore, in *Kurth Ranch*, the dichotomy of criminal and civil forfeiture was considered not to be of importance in terms of their punitive nature. It was held in *Kurth Ranch* that labeling a proceeding as civil, rather than criminal, would not prevent it from having punitive rather than remedial characteristics. The Court, ironically, cited the extreme differences between criminal and civil proceedings only two years after *Kurth Ranch* in *Ursery*

(*Department of Revenue of Montana, Petitioner v. Kurth Ranch* 1994; Watterson, 1997).

The Court used a two-part test, one that was established in *89 Firearms* in 1984, to decide the case. The first issue was to determine the intentions of Congress regarding the forfeiture proceedings. Were they punitive or remedial? The Court stated that the intentions of Congress were remedial. Civil forfeiture actions were considered to be civil actions by Congress, and they therefore had remedial characteristics. The Court also stated that historically and traditionally acts *in rem* were regarded as civil proceedings (*United States v. Ursery* 1996; Brand, 1996; Schroeder, 1996; Watterson, 1997).

In addition, civil proceedings have remedial goals. They seek to deter the illegal firearms trade and to remove firearms that were illegally used or were intended to be illegally used from circulation. In the second part of its test, the Court identified whether civil forfeiture constituted an added penalty in fact, regardless of Congress' intention. It was held that civil forfeiture was truly remedial rather than punitive, and it was a separate proceeding. The Court also maintained that the requirement of the forfeiture of assets be used in drug trafficking

would help ensure that property owners would not let their assets be used in crime (*United States v. Ursery* 1996; Brand, 1996; Schroeder, 1996; Watterson, 1997).

The latest landmark case regarding excessive fines involved the violation of the requirement to report large amounts of money before leaving the United States. In *United States v. Bajakajian* in 1998, the respondent was leaving the country and failed to report the large amount of cash that he was taking with him. The money was discovered by the Customs agents. Congressional legislation mandated that the respondent forfeit the entire amount as punishment (*United States v. Bajakajian* 1998; Johnson, 2000).

This case was considered to be a criminal forfeiture, rather than a civil forfeiture because there was a crime committed. Thus, the forfeiture of the money was a fine imposed upon the respondent. Consequently, the Supreme Court held that the forfeiture was considered a fine under the Eighth Amendment, and the underlying concept of an excessive fine was *gross disproportionality*. Thus, forfeiture of the large amount of money was grossly disproportionate to a reporting violation (*United States v. Bajakajian* 1998; Johnson, 2000).

## Conclusion

After many various decisions were handed down by the United States Supreme Court regarding civil forfeiture, the Civil Asset Forfeiture Reform Act of 2000 was enacted by Congress in an attempt to resolve some of the problems related to civil forfeiture practices (Dunn 2000; Barnett 2001). Unfortunately, there is no provision that regulates the highly criticized equitable sharing provision, and the Act was not incorporated into State legislations, which means it is not binding on the States (Ross, 2000; Worrall, 2001). In addition, the law expands the civil forfeiture authority of law enforcement. The proceeds derived from any specifically defined illegal activity may legally be forfeited (Cassella, 2001).

On the other hand, the Act required clear evidence that shows that property is subject to forfeiture before the government can take action against it. In other words, the new law requires stronger evidence than probable cause, and it shifts the burden of proof from the innocent property owners to the federal government (Dunn, 2000; Cassella, 2001). The forfeiture of real property as it was held in *United States v. James Daniel Good Real Property* in 1993 is codified in the new Act. The statute requires that,

except in cases with exigent circumstances, the government should provide notice prior to seizure and an opportunity for a trial (*United States v. James Daniel Good Real Property* 1993; Cassella, 2001).

The Act allows for a joint innocent owner defense and the appointment of legal counsel for the people who cannot afford it in cases at the federal level (Ross, 2000; Barnett, 2001; Cassella, 2001; Worrall, 2001). It also allows the owner of the property to sue the government if the property is damaged while in the government's possession. The Act also gives the judge the opportunity to discharge the property, should the seizure present a substantial hardship to the owner. The use of criminal forfeiture in lieu of civil forfeiture, when possible, is also encouraged by the Act (H.R. 1658, 2000; Barnett, 2001).

Civil asset forfeiture practices have been heavily challenged over the excessive fines, double jeopardy, and due process clauses. Civil forfeiture proceedings were sometimes considered to be remedial rather than punitive, and sometimes they were regarded as punitive by the United States Supreme Court. Thus, depending on the ruling, they either did, or did not constitute double jeopardy. Currently they are considered to be remedial rather than

punitive and do not constitute double jeopardy (United States v. Halper 1989; United States v. Ursery 1996; Watterson, 1997).

Civil forfeiture is an important tool in the war on drugs, and law enforcers take the advantage of the lesser probable cause requirement of asset forfeiture cases (Reed 1992; Miller 1996). The new law that requires stronger evidence than probable cause is believed to shift the burden of proof from the innocent property owners to the federal government (Dunn, 2000; Cassella, 2001).

## CHAPTER IV

### THE CONSEQUENCES OF CIVIL ASSET FORFEITURE IN THE FIGHT AGAINST DRUGS

#### Analysis of Civil Asset Forfeiture as a Tool in the Fight Against Drugs

In spite of the existence of hundreds of laws regarding civil asset forfeiture, RICO and CCE have made the forfeiture practice the most fundamental aspect of the war on drugs. RICO has proven to be an important safeguard in the fight against organized crime, while CCE has become known as the "kingpin" law as a result of its effectiveness in efforts to bring down major drug traffickers (Miller, 1996). However, it has been argued that forfeiture laws have changed the attitudes that law enforcement agencies have had towards the drug war by creating the financial incentive to pursue drug traffickers. As a result of the amendments that were added to several criminal and civil codes, the main emphasis of law enforcement organizations were diverted from drug "bosses" to less important drug users, landowners, and petty dealers (Trebach and Inciardi, 1993).

Despite the fact that the theory behind asset forfeiture targets major drug traffickers and drug kingpins, in practice, police agencies tend to choose easy targets, focusing on wealthy drug users or people who have more assets (Bauman, 1995). The assets are targeted rather than the drug traffickers, and forfeiture laws are considered to be profitable by law enforcement agencies. In many cases, massive amounts of assets are seized in cases where there were relatively small quantities of drugs. For example, in the *Colero-Toledo* case, a house, a vehicle, a farm, and even a vessel were seized when police found a tiny amount of marijuana (*Calero-Toledo v. Pearson Yacht Leasing Co.* 1974; Miller, 1996).

Civil asset forfeiture came to be used as it is today for several reasons. First, there is currently no need for a criminal charge in order to begin forfeiture. This policy assumes that legal action is taken against the property not the person. It is that person's responsibility to take legal action against the government to get back the property (Trebach and Inciardi, 1993; Friedman, 1999).

Secondly, the sharing of proceeds by the law enforcement agencies encourages the current use of civil asset forfeiture. Local police organizations share the



proceeds of forfeiture with federal agencies. This incentive causes law enforcement officers to focus on drug offenders more than other types of criminals (Trebach and Inciardi, 1993).

Finally, law enforcement performance evaluation measures traditionally measured the success of a narcotics agency in terms of the number of seizures produced by each officer (Green, 1996). With the advent of civil forfeiture, the success of a narcotics agency has simply shifted slightly so that success is measured by the amount of money seized. The eradication of drugs, or of drug trafficking, the supposed supreme goal of the United States drug policy has always been out of the reach of law enforcement agencies (Lynch, 2000; Holden-Rhodes, 1997).

The ease with which law enforcement agencies can share in the proceeds of the drug business is one of the most controversial aspects of civil forfeiture (Benson and Rasmussen, 1996; Worrall, 2001). The equitable sharing policy introduced by the Comprehensive Forfeiture Act of 1984 requires cooperation among law enforcement agencies at federal, state, and local levels. This cooperation accomplishes three main objectives. First, it is intended to punish criminals by depriving them of the assets that

were used or gained by means of the criminal act.

Deterrence is a corollary to this goal of punishment.

Second, the establishment of cooperation among the various levels of law enforcement agencies promotes communication and the sharing of information between the agencies so that they can more effectively combat the drug problem. Finally, cooperative efforts between agencies often result in greater profits for those agencies due to the equitable sharing doctrine (Burnham, 1996; Levy, 1996).

The drug policy affects a wide range of professionals, including police officers and other civil servants. However, asset forfeiture practices are frequently performed by police agencies at federal, state and local levels. In practice, local police utilize federal laws in order to be able to keep the money and property they seize. By turning the greater part of the seizures over to federal agencies, they avoid state laws where constitutional provisions require the forfeited property should be allocated to education (Dillon, 2000).

Thus, not only can the sharing process bring together the joint efforts of local and federal agencies, it can also promote the adoption of local seizure by the federal

system (Aylesworth, 1991; Benson and Rasmussen, 1996; Worrall, 2001).

In sum, this sharing process presents significant advantages in several situations. First, when there is a need for federal laws that enable forfeiture. Second, when local agencies do not have the necessary resources to take legal action. Finally, the practice of sharing helps in complex cases that require federal investigation (Aylesworth, 1991; Benson and Rasmussen, 1996). These advantages stem from the fact that no formal joint operation is required in order to share the proceedings. Local enforcement agencies may take the advantage of this provision through "adoptive" forfeiture. Local agencies ask the federal government to take over a case that cannot be forfeitable according to state law, but can be forfeitable through the use of federal law. Thus, state laws can be bypassed through this procedure, and local agencies receive up to twenty percent by simply turning their case over to the federal government (Benson, Rasmussen and Sollars, 1995; Levy, 1996; Worrall, 2001).

This adoption process that enabled police agencies to keep the proceeds from civil asset forfeiture was introduced by the Crime Control Act of 1984, (Cassidy,

1993; Benson et al. 1995; Burnham, 1996), and subsequently was challenged by some bureaucrats. The enactment of the Anti-Drug Abuse Act of 1988 changed the terms of asset forfeiture that were introduced in the Act of 1984. Particularly, the 1988 Act attempted to repeal Section 6077. It was basically concerned with the adoption process in which seized assets were diverted from other services, including education, to be funneled into the coffers of law enforcement agencies. However, attempts to repeal Section 6077 of the 1984 Act were not successful (Benson and Rasmussen, 1996).

#### Disproportionate Impact of Civil Asset Forfeiture (Profit-Seeking Motive)

The practice of equitable sharing has enabled police agencies to keep the proceeds of forfeiture and has arguably changed the attitude of law enforcers towards the fight against crime. Asset forfeiture has become one of the main goals of police agencies. The money they seize goes towards buying new office furniture, paying overtime, and even buying new vehicles. All of these are ancillary expenses that do not directly contribute to the war on drugs (Cassidy, 1993; Miller and Selva, 1994; Benson and Rasmussen, 1996; Levy, 1996; Dunn, 2000). Because this

provision has enabled the channeling of seized assets to the agencies' budgets, cooperation among law enforcement agencies has increased significantly (Benson and Rasmussen, 1996). Some police agencies have also created forfeiture accounts, in which the money obtained from forfeitures in drug-related cases is used in narcotics buy operations (DEA, 2001; Hart, 2001).

Moreover, it is claimed that law enforcers assess the value of their drug cases based on their potential income generation. There is no regard for the amount of drugs involved, or the importance of the trafficker. Police agencies have realized that seized cash is channeled into their budgets much faster than other types of assets, such as real estate or automobiles. Thus, a "reverse sting," in which an undercover officer poses as a drug dealer, became a very important technique for law enforcers. The reverse sting enabled police agencies to pocket a large amount of money while arresting the persons who would be involved in the illegal act (Miller and Selva, 1994; Blumenson and Nilsen, 1998).

Consequently, law enforcement agencies have come to consider civil asset forfeiture to be a useful tool. It provides an easy and lucrative income for their agencies

(Cassidy, 1993). Thus, the law enforcement agencies have gradually become dependent on civil asset forfeiture and have become actively involved in such adoptive forfeitures (Worrall, 2001).

For instance, an analysis of more than 6000 federal cases involving drug-related asset forfeiture revealed that forfeiture laws have become an extremely important economic resource for the government. They have provided almost \$500,000,000 annually, particularly after the 1984 legislation that extended and reinforced forfeiture laws. The data used in the study included information obtained from the United States Marshal's Service (USMS). The research covered a two-year period, namely the fiscal years of 1991 and 1992. That period of time was considered to have yielded the highest income due to federal asset forfeiture (Warchol et al. 1999).

The data that were analyzed included detailed information about asset seizures and judicial proceedings in four different districts, namely the Eastern District of Michigan, Southern Districts of Florida and California, and the Northern District of Illinois. These four districts were selected for very particular reasons. The Florida and California districts were regarded as hot spots in terms of

illicit drug trafficking. The Michigan and Illinois districts, on the other hand, were located centrally, and were considered to exhibit dissimilar characteristics than the districts that were on the borders. The findings of the study revealed that conveyances and financial means were the main focus for all the districts in the study. The percentage of assets forfeited by way of administrative or civil proceedings was considerably higher than those forfeited in criminal proceedings (Warchol et al. 1999).

Moreover, an examination of the difference between assets that were forfeited or not forfeited made it clear that the government considered the economic worth of the property to be an important indication of effectiveness. Another finding was that there have been major differences between the percentages of criminal forfeiture and civil forfeiture. Police agencies rarely used criminal forfeiture. Instead, they used civil forfeiture, particularly administrative forfeiture, which was considered to be a more competent, rapid, and cost-effective approach. The apparent focus on conveyances may be interpreted as an attempt of the law enforcement agencies to immobilize illicit drug trafficking networks (Warchol et al. 1999).

Other studies have used a "disguised observations method," also known as a "complete-member-researcher" approach to uncover some remarkable findings. One such researcher worked as a confidential informant for police drug enforcement squads for one year. The drug enforcement agents knew neither the real identity of the researcher nor the goals of his research. Thus, data were based on the practices and observations of the researcher, who actually infiltrated the very elusive and secret narcotics divisions of law enforcement agencies. The researcher was involved in twenty-eight drug cases with various law enforcement departments, including metropolitan and urban law enforcement officers, state, city police and sheriffs' departments (Miller and Selva, 1994).

His disguised observations method provided the researcher with a better understanding of the priorities of the police in asset forfeiture practices. One of the undercover operations made it clear that potential profit involved was a greater priority to police than the amount of drugs they intercepted, or the nature of the drug dealer. Police became aware of a drug dealer who was trying to sell marijuana. At about the same time, they uncovered a distributor who was looking to buy a lesser amount of



marijuana than the former. Despite the fact that drug dealer was a previously convicted suspect and that his drugs would be put into circulation if not seized, the narcotics agents chose to pursue the case where they could employ a "reverse-sting." They preferred the buyer because he owned a truck and had more than \$700 that could be seized. Their decision was simply based on the potential cash profits they would receive from busting up the crime (Miller and Selva, 1994).

Thus, a relatively small amount of profit was gained by the police while a larger amount of drugs were let go into circulation. A small-time dealer was arrested rather than a known suspect (Miller and Selva, 1994). This a perfect example of the claim that law enforcement officers are encouraged to base their decisions on the profits that they will gain from asset seizures, rather than on the effectiveness of their operations to deter or punish crime (Bertram et al. 1996).

In another case, the police terminated a drug deal with a suspect who dealt cocaine and marijuana because the amount of drugs that was subject to the reverse sting was considered to be negligible by the supervisor. However, the supervisor later changed his mind about the limit and

attempted to reinitiate the same deal. By this time, however, the dealer had lost his confidence towards the informant\researcher. The supervisor then allowed the dealer to sell his drugs on the street, waiting until afterwards to seize the cash rather than seizing the drugs and keeping them out of the hands of users (Miller and Selva, 1994).

In addition to problems like these, the profit-seeking attitudes of police agencies has resulted in competition among the law enforcers, sometimes harming the cooperation that is required to fight crime. A very important deal was terminated because the location of the deal fell into another agency's jurisdiction. Although agents could have easily informed their counterparts so that a known suspect with more than two pounds of cocaine and a considerable amount of money could have been seized, they did not inform them. Finally, the police preferred to eradicate marijuana plants and seize \$500 in valuable assets of a suspect without bringing him upon charges for growing marijuana. The researcher was stunned by this situation, and was told that the suspect would be prosecuted later, but he was not. The police were more interested in taking the suspects'

money than prosecuting him for growing contraband (Miller and Selva, 1994).

A recent study analyzed a 1998 national survey regarding law enforcement agencies, the criminal and civil regulations of the fifty states as well as the District of Columbia, and data from the Law Enforcement Management and Administrative Statistics. The study concluded that civil asset forfeiture was an important budgetary supplement for the law enforcement organizations. What is more, a considerable number of law enforcement agencies have become dependent on civil asset forfeiture (Worrall, 2001).

#### Fairness of Civil Asset Forfeiture Implementations

The practice of civil asset forfeiture in drug-related cases is an important example of the discretion used in positive law in the United States. One of the important problems that arises from civil forfeiture results from the value of the seized assets and the way to spend those assets (Abadinsky, 2001). In fact, it has been claimed that law enforcement officers believe that civil liberties get in the way of crime-fighting. They are powerful tools that enable citizens to interfere with government actions. Thus, law enforcement agencies will take any opportunity available to skirt around these protections, taking

whatever they can from people they believe to be criminals. The American criminal justice system works on the assumption that it is better to let ten guilty men go free than put one innocent man behind bars. This makes the task of police officers both difficult and discouraging. They have come to view the term "civil liberties" as a catch phrase defense attorneys use to save their clients from jail. Police have forgotten that civil liberties were put in place to protect the innocent from unreasonable arrest (Miller, 1996).

Moreover, police are more likely to consider minorities to be drug users and potential criminals, thus, they disproportionately focus their efforts on minorities. According to these sub cultural assumptions, potential drug users are more likely to be African-Americans, and the statistics verify this perception by showing that the majority of prison inmates are African-Americans (Kappeler, et al. 2000).

Consequently, police officers use "racial profiling" in their activities against illicit drugs. In a ten-month study conducted in 1991 on asset forfeiture and innocent property owners, an examination of judicial documents concerning 121 police stops in which drugs were not found

but money was seized showed that Hispanic, African-American, and Asian people comprised an overwhelming majority of those cases, with seventy-seven percent (Schneider and Flaherty, 1991).

An examination of 310 official declarations from twenty-eight dissimilar police agencies on profiling and seizures revealed that criminal profiling consisted of several doubtful assumptions that were not consistent with any kind of scientific explanation. Furthermore, profiling assumptions varied from one police agency to the other. For example, one agency might consider someone who leaves an aircraft first to be a potential drug courier due to his or her rush, while another agency would consider someone who leaves a plane last to be doubtful because of his or her attempt to seem unworried. Moreover, if someone leaves an airplane neither first nor last but among other people, he or she may be considered as suspicious due to their attempt to hide in the crowd. Suspicion also arises if a person's destination or departure city is considered to be a source for illicit drugs (Schneider and Flaherty, 1991).

In addition to these, there are other traits that are regarded as suspicious by police officers. These traits also vary greatly among different law enforcement agencies.

For example, walking rapidly may be considered suspicious by some agencies, while walking slowly may be considered suspicious by other agencies. In fact, police officers will cite these types of pseudo-criminalistic traits in order to justify a stop or arrest of a person who is a racial or ethnic minority (Schneider and Flaherty, 1991).

The ten-month study also revealed the number of innocent property owners who have been harmed by the bad policy implementations of the law enforcement officers. The study revealed that people were *presumed guilty*. The study consisted of an examination of 25,000 seizures that were performed by the Drug Enforcement Administration (DEA), interviews with 1,600 defense lawyers, people who were victimized, police officers, prosecutors, and federal agents. It also included an examination of judiciary documents in 510 cases. The study concluded that as a result of civil asset forfeiture laws, the civil rights of a considerable number of Americans were violated and their properties were seized without any criminal conviction, but based solely on probable cause. Among those people whose property was seized by the federal government, only twenty percent were charged for criminal offenses (Schneider and Flaherty, 1991). A sheriff's department in Volusia County

provides a particularly poignant example of police who abuse civil asset forfeiture laws. These officers stopped certain people on the highways of Florida on the grounds that they were drug couriers. They seized any cash found over \$100, assuming that must have been drug money. The money was forfeit whether they found drugs or not (Reed, 1992; Hay, 1996).

At this point, it is worth noting that in most civil asset forfeiture cases, victims do not contest the loss of their assets. To do so would place an even greater financial burden on the claimant in order to contest the trial and recover the property back from the government. Moreover, sometimes the cost of the legal proceedings may well go beyond the cost of the seized assets. In short, legal costs are either too expensive to afford or they exceed the value of the seized assets (Levy, 1996; Warchol et al. 1999). For example, a cosmetics dealer had \$9,460 seized by the DEA based on probable cause. The law required that ten percent of the seized amount should be mailed to the government and the legal cost of the case was \$2,000. In addition, the government extended the case urging him to terminate his contest. In another example, a couple's mobile home worth \$22,000 was seized upon their plea of

guilty for raising a few marijuana plants behind the home. Their lawyer charged them \$400 to pursue the case, and the government required them to pay \$2,500 in order to return their mobile home back. Thus, the victims had to take out a loan paying more than \$150 a month to get their home back (Levy, 1996).

The situation becomes worse when cash is involved in the seizure. The claimant must assert a claim on the cash within ten days, starting from the date of seizure. Therefore, law enforcers tend to seize cash, and they frequently focus on minorities who tend to have few legal resources. For example, in Florida, "highway robbery" took place on Interstate 95 where a sheriff's department made stops based on probable cause. More than ninety percent of the stopped drivers were either Hispanic or African-American. Over a three-year period, more than \$8 million was seized. However, no drugs were found in seventy-six percent of the stops (Levy, 1996).

In sum, not only do the forfeiture laws harm the American justice system by encouraging unjust implementations of the laws, they also change the attitudes of police agencies towards the drug war by creating financial motivation among them. For example, the



establishment of the Asset Forfeiture Fund resulted in a major change in the ideology that motivated police, shifting from deterrence to basic, simple profit-seeking (Friedman, 1999; Ross, 2000). Also, civil forfeiture laws are applied to petty dealers and innocent people, whereas they were intended to be used against major drug traffickers. Consequently, according to a 1995 United States Sentencing Commission report, more than half of all federal-level convictions were small-time drug offenders, including drug sellers at street level and drug couriers. Moreover, among 20,000 drug offenders at the federal-level, only forty-one of them were considered to be as major drug traffickers in 1998 (Sterling, 2001).

#### Conclusion and Recommendations

The war on drugs has had a huge impact, particularly on minorities in American society. It has levied a huge toll on society, increasing the costs of law enforcement, prisons, and treatment programs for addicts. One of the principle components of the drug war has been tougher sentencing practices, resulting in the incarceration of a considerable number of American citizens, particularly African-Americans (Kappeler, et al. 2000; Walker, 2001). Tougher sentencing practices were intended to deter drug

criminals. However, deterrence depends on certainty. These laws are biased in their application. Although mandatory minimum sentences, the most important components of tougher sentencing, resulted in an increase in the severity of the punishment, their race-based applications have noticeably lessened their certainty. As a result, their deterrent effects have been diminished (United States Sentencing Commission, 1991).

It is argued that new regulations are required in order to address problems that have arisen from civil asset forfeiture practices. First, the profit-seeking motive of the law enforcement agencies should be eliminated or at least it should be decreased. This could be accomplished through the elimination of the equitable sharing provision. Forfeited assets should be deposited in the Treasury Department's general fund rather than the police agencies' budget (Blumenson and Nilsen, 1998; Ross, 2000).

In addition, there should be amendments to the "adoption" process, in which local police handover their problematical cases to federal agencies in order to receive twenty percent of the seized assets. Because of this procedure, all the funds that would otherwise be allocated to the schools, according to state laws, are funneled to

the local police who call upon federal laws. Forfeiture should be used as an important weapon against crime, instead of an income raising mechanism for law enforcement agencies (Schneider and Flaherty, 1991; Reed, 1992).

Second, it is claimed that the only way to maintain the benefits forfeiture allows law enforcers and property owners is to keep the practice of forfeiture using it only in criminal cases (Schneider and Flaherty, 1991; Reed, 1992). This way, asset forfeiture would be performed in conjunction with a criminal charge, and persons subject to forfeiture would consequently be afforded greater constitutional protection. Innocent property owners would not be hurt, and forfeiture laws would not be left up to the discretion of law enforcement officers (Reed, 1992).

The "Civil Asset Forfeiture Reform Act of 2000" requires stronger evidence than probable cause, and shifts the burden of proof from the innocent property owner to the federal government (Dunn, 2000; Cassella, 2001). The Act also allows for a joint innocent owner defense and the appointment of legal counsel for indigent people at the federal level (Ross, 2000; Barnet, 2001; Cassella, 2001; Worrall, 2001). What is more, the use of criminal forfeiture is encouraged by the Act (H.R. 1658, 2000;

Barnet, 2001). However, it is not binding on the States. Therefore, the Reform Act should be made binding on the States (Ross, 2000; Worrall, 2001).

Finally, even though the use of forfeiture in criminal cases only, is claimed to be the only way of maintaining the benefit of law enforcers and property owners, civil forfeiture should remain in effect. However, forfeiture should be used as an important weapon against crime, instead of an income raising mechanism for law enforcement agencies. Therefore, the so called "adoption" process should be eliminated.

The new law that requires stronger evidence than probable cause is believed to shift the burden of proof from the innocent property owners to the federal government. However, it is not binding on the States. Therefore, the Reform Act should be made binding on the States. This is mainly because primary actors of civil asset forfeiture practice are the local level law enforcers.

#### REFERENCE LIST

- Abadinsky, H. (2001). *Drugs: An introduction*. CT:  
Wadsworth/Thomson Learning, Inc.
- Akers, R.L. (2000). *Criminological theories: Introduction, evaluation, and application*. Los Angeles: Roxbury Publishing Company.
- Aylesworth, G.N. (1991). *Forfeiture of real property: An overview*. Asset Forfeiture Series #14. Washington, DC: United States Bureau of Justice Assistance.
- Barnet, T. (2001). Legal fiction and forfeiture: An historical analysis of the civil asset forfeiture reform act. *Duquesne University Law Review*. Retrieved May 23, 2002, from <http://web.lexis-nexis.com>
- Bauman, R.E. (1995). Take it away. *National Review*. Retrieved June 27, 2001, from <http://www.texshare.edu/ovidwed/ovidweb>
- Baur, M.J. (1996). Innocent owners and guilty property: *Bennis v. Michigan*, 116 S. Ct. 994 (1996). *Harvard Journal of Law and Public Policy*, 20:279-293. Retrieved August 27, 2001, from <http://ehostvgw21.epnet.com>

Benson, B.L., Rasmussen, D.W., & Sollars, D.L. (1995).

Police bureaucracies, their incentives, and the war on drugs. *Public Choice*, 83:21-45. Kluwer Academic Publishers.

Benson, B.L., & Rasmussen, D.W. (1996). Predatory public finance and the origins of the war on drugs.

*Independent Review*, 1:163-190. Retrieved August 27, 2001, from <http://ehostvgw21.epnet.com>

Benson, B.L., & Rasmussen, D.W. (1998). The context of drug policy: An economic interpretation. *Journal of Drug*

*Issues*. Retrieved September 19, 2001, from <http://ehostvgw3.epnet.com>

Bentham, J. (1789). Introduction to the principles of morals and legislation. In R.C. Solomon & M.C. Murphy (Eds.), in *What is Justice: Classic and Contemporary Readings* (pp.215-220). NY: Oxford University Press.

Bertram, E., Blachman, K.S., & Andreas, P. (1996). *Drug War Politics: The Price of Denial*. London: California Library of Congress Press, Ltd.

Blacher, R.E. (1994). Clearing the smoke from the battlefield: Understanding Congressional intent regarding the innocent owner provision of 21 U.S.C. 881 (a) (7). *Journal of Criminal Law & Criminology*.

- Retrieved June 27, 2001, from  
<http://www.texshare.edu/ovidwed/ovidweb>
- Blumenson, E., & Nilsen, E. (1998). The drug war's hidden economic agenda. *Nation*. Retrieved July 02, 2001, from  
<http://www.texshare.edu/ovidwed/ovidweb>
- Brand, R.L. (1996). Civil forfeiture as jeopardy: United States v. Ursery, 116 S. Ct. 2135 (1996)." *Harvard Journal of Law & Public Policy*. Retrieved June 27, 2001, from <http://www.texshare.edu/ovidwed/ovidweb>
- Brodey, J. (1997). The Supreme Court rejects Fifth and Fourteenth Amendment protection against the forfeiture of an innocent owner's property. *Journal of Criminal Law and & Criminology*. Retrieved June 27, 2001, from  
<http://www.texshare.edu/ovidwed/ovidweb>
- Burnham, D. (1996). *Above the Law: Secret Deals, Political Fixes and Other Misadventures of the U.S. Department of Justice*. New York: Scribner.
- Calero-Toledo Et Al. v. Pearson Yacht Leasing Co. No. 73-157 416 U.S. 663; 94 S. Ct. 2080; 40 L. Ed. 2d 452; (1974)
- Cassella, S.D. (2001). The civil asset forfeiture reform act of 2000: Expanded government forfeiture authority and strict deadlines imposed on all parties. *Journal*

- of Legislation*. Retrieved May 23, 2002, from  
<http://web.lexis-nexis.com>
- Cassidy, P. (1993). Without due process. *The Progressive*.  
 Retrieved August 27, 2001, from  
<http://www.texshare.edu/ovidwed/ovidweb...>
- Caulkins, J.P., Rydell, P.C., Schwabe, W.L., & Chiesa, J.  
 (1997). Mandatory minimum drug sentences: Throwing  
 away the key or the taxpayers' money? Retrieved May  
 23, 2002, from <http://www.rand.org>
- Cole, G.F., & Smith, C.E. (2001). *The American system of  
 criminal justice*. (9<sup>th</sup> ed.). Stamford, CT: Wadsworth.
- Currie, E. (1998). *Crime and punishment in America*. New  
 York: Metropolitan Books Henry Holt and Company, Inc.
- DEA. *Controlled Substances Schedule*. (2001). Retrieved May  
 23, 2002, from  
<http://www.usdoj.gov/dea/pubs/schedule.pdf>
- Department of Revenue of Montana, Petitioner v. Kurth Ranch  
 Et Al. No. 93-144 (1994)
- Dillon, K. (2000, May 20). Cash in custody. A special  
 report on police and drug money seizures: Police,  
 federal agencies resist change. *Kansas City Star*.  
 Retrieved May 02, 2001, from  
<http://www.kcstar.com/projects/drugforfeit/new7.htm>



Dunn, K. (2000). Reining in forfeiture: Common sense reform in the war on drugs. Retrieved June 15, 2001, from <http://www.pbs.org>

Eldredge, D.C. (1998). *Ending the war on drugs: A solution for America*. New York: Bridge Works Publishing Company Bridgehampton.

Fann, L.E., Gordon, G.G., & Leach, A.W. (1993). *How to Present the Forfeiture Case to the Prosecutor*. Asset forfeiture series #16. Washington, DC: U.S. Bureau of Justice Assistance.

Friedman, D. (1999). Why not hang them all: The virtues of inefficient punishment. *The Journal of Political Economy*. Retrieved May 16, 2002, from <http://www.jstor.org/>

Goldsmith, M. (1992). *Civil forfeiture: Tracing the proceeds of narcotics trafficking*. Asset Forfeiture Series #1. Washington, DC: U.S. Bureau of Justice Assistance.

Goldsmith, M., & Lenck, W. (1992). *Asset forfeiture: Protection of third-party rights*. Asset Forfeiture Series #12. Washington, DC: U.S. Bureau of Justice Assistance.

- Green, L. (1996). *Policing places with drug problems*. CA: Sage Publications, Thousand Oaks.
- Hart, K. (2001). Fade runs short on drug-buy money. 2001 *The Daily Independent, Inc.* Retrieved August 27, 2001, from <http://www.mapinc.org/drugnews/v01.n1706.a02.html>
- Hartman, V.E. (2001). Implementing an asset forfeiture program. *FBI: Law Enforcement Bulletin*. Retrieved June 15, 2001, from <http://www.texshare.edu/ovidweb/ovidweb...>
- Hay, D. (1996). Highway robbery. *World Press Review*. Retrieved August 27, 2001, from <http://www.texshare.edu/ovidweb/ovidweb...>
- Heching, M. (1993). Civil forfeiture and the innocent owner defense: United States v. 92 Buena Vista Ave., 113S. CT.1126 (1993). *Harvard Journal of Law & Public Policy* Retrieved September 19, 2001, from <http://ehostvgw21.epnet.com>
- Holden-Rhodes, J.F. (1997). *Sharing secrets: Open source intelligence and the war on drugs*. CT: Praeger, Westport.
- Hobbes, T. (1651). Leviathan. In R.C. Solomon & M.C. Murphy (Eds.), in *What is Justice: Classic and Contemporary Readings* (pp.63-73). NY: Oxford University Press.

- Hume, D. (1751). An enquiry concerning the principles of morals. In R.C. Solomon & M.C. Murphy (Eds.), in *What is Justice: Classic and Contemporary Readings* (pp.137-141). NY: Oxford University Press.
- Inciardi, J. A. (1999). *Criminal justice*. (6<sup>th</sup> ed.) FL: Harcourt Brace & Company.
- Istralowitz, R.E., & Telias, D. (1998). *Drug use, policy, and management*. CT: Praeger, Westport.
- Janzen, S. (1990). *Asset forfeiture: Informants and undercover investigations*. Asset forfeiture series #13. Washington, DC: U.S. Bureau of Justice Assistance.
- Jenkins, S. (2001). The war our leaders are happy to forget. *2001Times Newspapers Ltd*. Retrieved May 16, 2002, from <http://www.mapinc.org/drugnews/v01.n1694.a13.html>
- Jensen, E.L., & Gerber, J. (1996). The civil forfeiture of assets and the war on drugs: Expanding criminal sanctions while reducing due process protections. *Crime and Delinquency*. Retrieved June 27, 2001, from <http://www.texshare.edu/ovidweb/>

- Jensen, E.L., & Gerber, J. (Eds.) (1998). *The new war on drugs: Symbolic politics and criminal justice policy*. OH: Anderson Publishing Co.
- Johnson, B.L. (2000). Purging the cruel and unusual: The autonomous excessive fines clause and desert-based constitutional limits on forfeiture after United States v. Bajakajian. *University of Illinois Law Review*. Retrieved September 19, 2001, from <http://web.lexis-nexis.com>
- Jordan, D.C. (1999). *Drug politics, dirty money and democracies*. OK: University of Oklahoma Press, Norman Publishing Division of the University.
- Kappeler, V.E., Blumberg, M., & Potter, G.W. (2000). *The mythology of crime and criminal justice*. IL: Waveland Press, Inc.
- Larson, A. (2000). Criminal forfeiture. *Expert Library*. Retrieved June 21, 2001, from <http://www.expertlaw.com/library/pubarticles/Criminal/Forfeiture.html>
- Levy, L.W. (1996). *A license to steal: The forfeiture of property*. NC: The University of North Carolina Press.
- Locke, J. (1690). Second treatise of government. In R.C. Solomon & M.C. Murphy (Eds.), *in What is Justice:*

- Classic and Contemporary Readings* (pp.74-80). NY: Oxford University Press.
- Lyman, D.M., & Potter, W.G. (1998). *Drugs in society: Causes, concepts and control*. OH: Anderson Publishing Co.
- Lynch, T. (2000). *After prohibition: An adult approach to drug policies in the 21<sup>st</sup> century*. Washington, D.C.: Cato Institute.
- Meeker-Lowry, S. (1996). Asset forfeiture. *Zmagazine*. Retrieved June 21, 2001, from <http://www.zmag.org/zmag/articles/jan96meeker.htm>
- Miller, R.L. (1996). *Drug warriors and their prey: From police power to police state*. CT: Westport, Praeger.
- Miller, J.M., & Selva, L.H. (1994). Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs. In L.K. Gaines & P.B. Kraska (Eds.), in *Drugs, Crime and Justice: Contemporary Perspectives* (pp.275-296). IL: Waveland Press, Inc.
- Noya, S.T. (1996). Hoisted by their own petard: Adverse inferences in civil forfeiture. *Journal of Criminal Law & Criminology*. Retrieved July 02, 2001, from <http://www.texshare.edu/ovidweb/ovidweb...>

- Nozick, R. (1974). Philosophical explanations. In R.C. Solomon & M.C. Murphy (Eds.), in *What is Justice: Classic and Contemporary Readings* (pp.212-215). NY: Oxford University Press.
- Office of National Drug Control Policy. (n.d.). *The national drug control strategy, 2000 annual report*. Washington D.C.: U.S. Government Printing Office.
- Reed, T.G. (1992). American forfeiture law: Property owners meet the prosecutor. *Policy Analysis*, No. 179. September 29, 1992. Retrieved June 15, 2001, from <http://www.cato.org//pubs/pas/pa-179.html>
- Richard Lyle Austin, Petitioner v. United States No.92-6073, 509 U.S. 602; 113 S. Ct. 2801 (1993).
- Ross, D.B. (2000). Civil forfeiture: A fiction that offends due process. *Regent University Law Review*, Retrieved September 19, 2001, from <http://web.lexis-nexis.com>
- Schaler, J. A. (1998). (Ed.) *Drugs: Should we legalize, decriminalize, or deregulate?* Amherst, N.Y.: Prometheus Books.
- Schmallegger, F. (2001). *Criminal law today*. Upper Saddle River, NJ: Prentice-Hall, Inc.

Schneider, A., & Flaherty, M.P. (1991). Presumed guilty.

*The Pittsburgh Press Co.* Retrieved June 15, 2001, from

<http://256.com/gray/presume>

Schroeder, W.R. (1996). Civil forfeiture: Recent Supreme

Court cases. Retrieved June 15, 2001, from

<http://209.52.183.182/agitator/fbileb.htm>

Sterling, E. (2001). And justice for all? Our anti-drug

sentencing is perverse. *Common Dreams, News Center*,

Retrieved April 08, 2002, from

<http://commondreams.org/views/050900-101.htm>

Swanson, R.C., Taylor, R.W., & Territo, L. (2001). *Police*

*administration: Structures, processes, and behavior.*

Upper Saddle River, New Jersey: Prentice-Hall, Inc.

Tina B. Bennis, Petitioner v. Michigan No. 94-8729 (Bennis

v. Michigan 116 S. Ct. 994(1996)

Trebach, A.S., & Inciardi, J.A. (1993). *Legalize it?:*

*Debating American drug policy.* The American University  
Press.

United States Sentencing Commission (1991). Special report

to the Congress: Mandatory minimum penalties in the

federal criminal justice system. Retrieved April 08,

2002, from <http://www.ussc.gov/manmin/manmin51.htm>

United States v. Halper No. 87-1383, 490 U.S. 435; 109 S.

Ct. 1892; 104 L. Ed. 2d 487; (1989)

United States, Petitioner v. A Parcel Of Land, Buildings,

Appurtenances And Improvements, Known as 92 Buena

Vista Avenue, Rumson, New Jersey, Et Al. No. 91-781

United States, Petitioner v. Guy Jerome Ursery No. 95-345-

518 U.S. 267; 116 S.Ct.2135; 135 L. Ed. 2d 549 (1996)

United States, Petitioner v. Hosep Krikor Bajakajian No.

96-1487 (1998).

United States, Petitioner v. James Daniel Good Real

Property Et Al. No. 92-1180 (1993)

Vallance, T.R. (1993). *Prohibition's second failure: The*

*quest for a rational and humane drug policy.* Westport,

CT: Praeger.

Walker, S. (2001). *Sense and nonsense about crime and*

*drugs: A policy guide.* (Fifth Ed.) Belmont, CA:

Wadsworth/Thomson Learning.

Warchol, G.L., Payne, D.M., & Johnson, B.R. (1999). Federal

forfeiture: Law, policy and practice. *Justice*

*Professional*, 11:pp.403-425. Retrieved August 27,

2001, from <http://ehostvgw21.epnet.com>

Watterson, S.J. (1997). Putting the Halper genie back in

the bottle: Examining United States v. Ursery in light



of Halper, Austin, and Kurth Ranch. *Brigham Young University Law Review*, Retrieved September 19, 2001, from <http://ehostvgw21.epnet.com>

Weinreb, L.L (Ed.) (2001). *Leading Constitutional Cases of Criminal Justice*. New York Foundation Press.

Whitebread, C.H., & Slobogin, C. (2000). *Criminal procedure: An analysis of cases and concepts*. New York Foundation Press. Fourth Edition.

Worrall, J.L. (2001). Addicted to the drug war: The role of civil asset forfeiture as a budgetary necessity in contemporary law enforcement. *Journal of Criminal Justice*, 29:171-187. Elsevier Science Ltd.